IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. [redacted] 142

COLEMAN F. MADDEN,

Petitioner,

AGAINST

QUEENS COUNTY JOCKEY CLUB, INC.,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, County of Queens and Brief in Support Thereof.

RAPHAEL H. WEISSMAN,
Attorney for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

SUBJECT INDEX.

CASES CITED.

STATUTES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

COLEMAN F. MADDEN,
Petitioner,

AGAINST

QUEENS COUNTY JOCKEY CLUB, INC.,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, County of Queens.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Coleman F. Madden, respectfully represents to this Court:

FIRST: On April 17, 1947, the Court of Appeals, the highest court of the State of New York in which a decision could be had, affirmed a final judgment dismissing petitioner's complaint, wherein petitioner claimed and was denied the equal right and privilege with all other persons—under the Constitutional guaranty of the equal protection of the laws—to participate in pari-mutuel betting at

a licensed race track as specially authorized by a statute of the State of New York (R. 23-27, 55-61).

SECOND: The Constitution of the State of New York prohibits all forms of betting "except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government" (Article I, Section 9). Pursuant to the authorization of the State Constitution, New York enacted a law known as Chapter 254 of the Laws of 1940, wherein it was provided, in part, that "pari-mutuel betting shall only be conducted within the grounds or enclosure of a race track" pursuant to a "license to conduct pari-mutuel betting from the New York State Racing Commission."

THIRD: Petitioner's complaint alleges that petitioner is a natural born citizen and a resident and taxpayer of the State of New York; that respondent, a domestic corporation, as owner of Aqueduct Race Track conducts horse races and pari-mutuel betting by license from the New York State Racing Commission; that in July, 1945, petitioner tendered the admission price and sought admission to Aqueduct for the purpose of participating in pari-mutuel betting, but that without cause or excuse respondent barred petitioner and stated to petitioner its purpose to continue to bar him in future; that in conducting pari-mutuel betting respondent is exercising a franchise granted to it by the State of New York and that consequently respondent is under a duty to accord to all persons the equal right and privilege of patronizing pari-mutuel betting; that respondent's acts in the past and threats for the future are arbitrary and discriminatory and constitute a denial to petitioner of "the equal protection of the laws (contrary to the New York State Constitution and) con-

trary to Section 1 of Amendment XIV of the Constitution of the United States" (R. 23-27).

FOURTH: Upon the complaint and affidavits, petitioner moved at Special Term of the Supreme Court of the State of New York, County of Queens, for an order enjoining respondent during the pendency of the action from preventing petitioner's exercise of his equal right and privilege of participating in pari-mutuel betting (R. 67).

FIFTH: The moving affidavits show that the New York Times erroneously reported testimony given at a public hearing in a disbarment proceeding. The testimony as given was that one "Owney" Madden was a bookmaker; the New York Times erroneously reported that "Coley" Madden was the alleged bookmaker (R. 8-20).

SIXTH: The moving affidavits, further, show that petitioner was originally barred upon the basis of the erroneous New York Times account, but that, after the proofs were delivered to it in this action that it was wrong, respondent, nevertheless, continued to bar petitioner and took the position that it could do so by its arbitrary will (R. 9-10).

SEVENTH: Respondent did not answer the complaint and did not controvert the facts set forth in the moving papers, but merely served a cross-notice of motion to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action (R. 21).

EIGHTH: Special Term held as a matter of law that respondent did not have the "absolute right" to exclude (R. 32), and, finding as a fact that petitioner "is a citizen of good repute and standing" (R. 28), it denied the

motion to dismiss the complaint and granted the temporary injunction (R. 33).

NINTH: Upon respondent's appeal, the Appellate Division of the Supreme Court, solely as a matter of law and not disputing Special Term's finding that petitioner is a citizen of good repute and standing, rendered final judgment dismissing the complaint and dissolved the injunction upon the ground that respondent had a right to "choose" its patrons (R. 43-44).

TENTH: Upon petitioner's appeal, the decision of the New York Court of Appeals, described in paragraph "FIRST" of this petition, affirmed the judgment rendered by the Appellate Division, also solely as a matter of law, holding that respondent has the power to exclude "solely of his (its) own volition" (296 N. Y. 249 at p. 253).

ELEVENTH: On May 16, 1944, upon the decision of the New York Court of Appeals, there was entered in the office of the Clerk of Queens County, who is the Clerk to the Supreme Court, Queens County, a judgment affirming the final judgment dismissing the complaint that was rendered by the Appellate Division and entered in the same County Clerk's office, where all the records of this case are lodged.

Opinions Below.

All three Courts below rendered opinions. The Special Term opinion (R. 28-33) is not officially reported. The Appellate Division opinion (R. 41-44) is reported in 269 App. Div. 644. The Court of Appeals' opinion (R. 55-61) is printed as an appendix to the brief in support of this petition and is reported in 294 N. Y. 249.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344b). The decision of the New York Court of Appeals, the highest court of the State in which a decision could be had, affirming the final judgment dismissing petitioner's complaint was rendered on April 17, 1947 (R. 55).

A judgment of affirmance was entered upon the New York Court of Appeals' decision on May 16, 1944, in the office of the Clerk of the County of Queens, who is Clerk of the Supreme Court of the State of New York, County of Queens, where all the records of this case are lodged (R. 52-54). The writ of certiorari should, therefore, be directed to the Supreme Court of the State of New York, County of Queens (*Adams* v. *United States*, 317 U. S. 264).

Petitioner's complaint, which was dismissed, claimed a right and privilege under the Constitution of the United States. Paragraph 11 of the complaint reads, as follows (R. 25-26):

> "That defendant's acts in the past and threats for the future in excluding plaintiff from the race track at Aqueduct and from attending horse races and from patronizing pari-mutuel betting conducted thereon during race meetings held and to be held pursuant to license from the State Racing Commission are arbitrary and discriminatory and that said acts and threats by defendant deny to plaintiff the equal protection of the laws, contrary to Section 11 of Article I of the Constitution of the State of New York and contrary to Section 1 of Amendment XIV of the Constitution of the United States."

The Federal right and privilege set up in the complaint was argued in the Court below. The New York Court of

Appeals in its opinion thus describes petitioner's position (296 N. Y. at p. 254):

> "Plaintiff, however, asserts a right founded upon the constitutional guaranty of equal protection of the laws."

The case relied upon to sustain jurisdiction is *Charleston Federal S. & L. Ass'n.* v. *Alderson* (324 U. S. 182).

The question presented is one of substance as is more fully shown in the brief in support of this petition.

Question Presented.

Whether—in view of the Constitutional guaranty of the equal protection of the laws—petitioner, a citizen of good repute and standing, may be denied the equal right and privilege under a statute of the State of New York, which authorizes pari-mutuel betting only within the confines of a licensed race track, by permitting the licensee arbitrarily to exclude him from the race track?

Specification of Errors to Be Argued.

The New York Court of Appeals erred in the following respects:

1. The right to participate in pari-mutuel as authorized by the statute is a privilege within the equal protection of the laws.

2. Since the statutory privilege is confined in its operation to licensed race tracks, all must be accorded equal opportunity for admission in order to make the statutory privilege equally available to all.

3. At least to the extent of the monopoly created by the license, respondent as pari-mutuel licensee exercises

official power which subjects it equally with the State to the obligation of the equal protection of the laws.

4. The chief error below lurks in the failure to perceive that at least to the extent of the monopoly created thereby, a pari-mutuel license is a franchise, subject to the equal protection of the laws.

Reasons for Granting the Writ.

(1) The petition presents a substantial question under Section 1 of Amendment XIV of the Constitution which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

(2) The question presented is not ruled by any decision of this Court.

(3) The decision below conflicts with principles laid down in decisions of this Court.

(4) No matter what the cause out of which it arises, the transcendent Constitutional question presented by the exercise of concededly arbitrary power to discriminate under license of a State statute is worthy of a hearing and final decision by this Court.

New York State Constitution and Statute Involved.

Section 9 of Article I of the Constitution of the State of New York, as amended and approved November 7, 1939, effective January 1, 1940, provides as follows:

> "No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due

judicial proceedings; no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section."

Section 2 of Chapter 254 of the Laws of 1940, effective March 31, 1940, provides as follows:

"In the exercise of the authority vested in it by section nine of article one of the state constitution, as amended by vote of the people at the general election in November, nineteen hundred thirty-nine, the legislature hereby prescribes that pari-mutuel betting on horse races shall be lawful in this state if conducted in the manner and subject to the conditions and supervision provided by this act, notwithstanding the provisions of any other law, general, special or local, prohibiting or restricting lotteries, pool selling or book-making, or any other kind of gambling; it being the purpose of this act to derive from such betting as herein authorized a reasonable revenue for the support of government and to promote agriculture generally and the improvement of breeding of horses particularly in the state. Such pari-mutuel betting shall only be conducted within the grounds or enclosure of a race track on races at such track and on such dates when racing at such track shall have been authorized pursuant to this act."

Section 4 of the same act provides as follows:

> "Any corporation or association, at the time of making application to the state racing commission for a license to conduct a race course or a race meeting for running races or steeplechases, or at such subsequent time as the state racing commission may permit, may apply to such commission for a license to conduct at such race meeting parimutuel betting on the races to be run thereat. The state racing commission may prescribe the form in which such application shall be made and the information to be furnished by such corporation or association. If the commission be satisfied from such application, or from other sources of information, that the race track of such corporation or association for which such application is made has facilities and equipment sufficient to accommodate its probable number of patrons, it shall issue to such corporation or association a license to conduct parimutuel betting in the manner and subject to the conditions described in such license on the days specified in such license."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of New York, County of Queens, directing that Court to certify and send to this Court for its review and determination on a day to be named therein, a full and complete transcript of the record and all proceedings of said Court herein, being the remittitur from the New York Court of Appeals entitled "*Coleman F. Madden, plaintiff-appellant,* v. *Queens County Jockey Club, Inc., defendant-respondent,*" decided April 17, 1947, and the order and final judgment entered in the Supreme Court of the State of New

York, Queens County, upon said remittitur, all filed under file No. 1486—1945, and that the judgment of said Court so entered upon the remittitur of the New York Court of Appeals be reviewed by this Court and for such other relief of this Court as may seem proper.

Dated: June 16, 1947.

COLEMAN F. MADDEN,
Petitioner.

RAPHAEL H. WEISSMAN,
Attorney for Petitioner.

Affidavit of Petitioner and Certificate of Counsel.

STATE OF NEW YORK,
COUNTY OF KINGS. } SS.:

COLEMAN F. MADDEN, being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

COLEMAN F. MADDEN.

Sworn to before me this
16th day of June, 1947.

GERTRUDE E. MAGUIRE
Notary Public in the
State of New York.
Residing in Queens Co.
Queens County Clerk's No. 1618.
Kings County Clerk's No. 199.
Commission expires March 30, 1948.

STATE OF NEW YORK,
COUNTY OF KINGS. } SS.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

RAPHAEL H. WEISSMAN,
Attorney for Petitioner.

Dated, Brooklyn, New York, June 16, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

COLEMAN F. MADDEN,
Petitioner,

AGAINST

QUEENS COUNTY JOCKEY CLUB, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344b) upon the grounds and under the authorities set forth in the jurisdictional statement of the petition.

Statement.

A complete statement of the case is set forth in the annexed petition and for the sake of brevity will not be repeated here.

Summary of Argument.

Section 1 of the Fourteenth Amendment of the Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws". The Court below sanctioned arbitrary discrimination against petitioner—"a citizen of good repute and standing" (R. 28)—under license of a New York State statute. The Constitutional question thus presented is worthy of a hearing and final decision by this Court.

It is no lesser claim to protection that the discrimination concerns pari-mutuel betting. For the all important concern in this Court is the Constitutionality of the discrimination. On the contrary, the real test of the integrity of the Constitutional guaranty is the indifferent or even the odious privilege. There rarely is need for protection of the privilege that the community esteems. So much needs immediately to be said because the substantial and important Constitutional question at bar could easily be obscured by individual predilections. Mr. Justice Holmes, whose constant teaching was that the two must be kept apart, said of another of the great guaranties in a memorable dissent, that we should be eternally vigilant against attempts to check the expression of opinions that we "loathe" (*Abrams* v. *United States*, 250 U. S. 616, 630).

The "equal protection of the laws" guaranteed by the Fourteenth Amendment contemplates that "no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances" (*Barbier* v. *Connolly*, 113 U. S. 27 at p. 31); it requires the "same privileges under the same conditions" (Id. at p. 31) and prohibits "different privileges under the same conditions" (*Soon Hing* v. *Crowley*, 113 U. S. 703 at p. 709). There can be little doubt that the statutory privilege to participate in pari-mutuel betting comes within the broad compass of equal protection as thus defined.

If the statute provided in express terms that parimutuel betting at licensed race tracks were permitted to all except the petitioner, there can be equally little doubt that it would infringe the Fourteenth Amendment. Can the same result be accomplished by licensing others to administer the act and by giving the licensees arbitrary power to exclude petitioner from participation? *Qui facit per alium facit per se.* It is well established by the decisions of this Court that if a statute is administered by "public authority" with an "unequal hand" there is a denial of equal protection within the prohibition of the Constitution (*Yick Wo* v. *Hopkins*, 118 U. S. 356, at pp. 373-374; *Kotch* v. *Board of River Port Pilot Com'rs*, No. 384, October Term, 1946, Decided March 31, 1947).

It remains to be seen whether the statute is being administered by "public authority", because it is admittedly being done by "unequal hand". As licensee respondent wields "public authority" subject to the obligation of equal protection. For the Constitutional restraint binds all delegates of official power equally with government officers in the proper sense of that word. Mr. Justice Cardozo put it thus (*Nixon* v. *Condon*, 286 U. S. 73, at pp. 88-89):

> "The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power. * * * The test is not whether the members of the executive committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in

such a sense that the great restraints of the Constitution set limits to their action."

Since the statute permits the conduct of pari-mutuel only at licensed race tracks and forbids it anywhere else, the license not only grants a permit, but it also grants a monopoly. Certainly to the extent of the monopoly granted by the license, respondent is "invested with an authority independent of the will of the association." Certainly to the extent of the monopoly granted by the license, respondent is a repository "of official power". For equally certainly the monopoly depends solely upon the statute. Exercising "authority independent of the will of the Association" as a repository "of official power" granted to it by the license, respondent is under like restraint with any organ of the State not to apply it with "unequal hand".

It is no answer to all this for respondent to say that its race track is private property (*Marrone* v. *Washington Jockey Club*, 227 U. S. 633; *Western Turf Association* v. *Greenberg*, 204 U. S. 59). For petitioner does not claim that an obligation to accord equal accommodation arises as an incident of the mere ownership of a race track. Nothing more than this is negatived by the cited cases. The point here is that it arises out of the acceptance of the license. The licenses under the statute at bar are not forced on race track proprietors. They are, on the contrary, much coveted by them, because the monopolies created by the licenses are enormously profitable.

The Court below erred chiefly because it failed to give effect to the monopoly granted by a license under the statute. For the New York Court of Appeals does not deny the obvious proposition that if the license is a franchise, then the licensee must accord equal accommodation. The holding of that Court is that the license is not a franchise. In its opinion (296 N. Y. at p. 255):

> "A franchise is a special privilege, conferred by state on an individual, which does not belong to the individual as a matter of common right."

The reason why the pari-mutuel license was held not to be a franchise is stated in its opinion, as follows (296 N. Y. at p. 256):

> "Observing, however, that the conduct of races for stakes had long been declared illegal 'except as specially authorized', plaintiff argues from that that the license was in effect a franchise, since it granted a privilege not previously enjoyed by common right. That, though, overlooks the fact that the privilege of conducting horse races for stakes does exist at the common law, that it is taken away only by statute, and that the statute's prohibition is removed only under certain circumstances and upon compliance with specified conditions. (See *Corrigan* v. *Coney Island Jockey Club, supra; cf. Marrone* v. *Washington Jockey Club, supra; Western Turf Association* v. *Greenberg,* 204 U. S. 59.) Consequently, the license, instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute."

It is not apparent why a special privilege is any the less a special privilege, merely because it restores a pristine common law right, which is denied to all others by the State Constitution and statute. But even if the license restores a common law right, yet it restores it with a monopoly. Whatever may be said of the common law right to bet, certainly the monopoly feature of the license is solely a creature of the statute. At least to the extent of the monopoly that such a license grants, therefore, the license is a franchise even within the meaning of that

term as defined in the opinion of the New York Court of Appeals.

By the same token may be distinguished the bathhouse license in *Aaron* v. *Ward* (203 N. Y. 351) and the theatre license in *Woollcott* v. *Shubert* (217 N. Y. 212), as well as all the other licenses cited by the Court of Appeals' opinion. It is not illegal to go surf bathing outside of a licensed bathhouse; it may be done all along the surf. So, too, it is not illegal to do a play outside of a licensed theatre; it may be done at home, at school, at church, in a grove and at any other convenient place. These licenses and the others cited by the Court of Appeals grant permits, but they do not grant monopolies.

The Fourteenth Amendment forbids "the play and action of purely personal and arbitrary power" (*Hayes* v. *Missouri*, 120 U. S. 68 at p. 71). The Court below held that a licensee under the statute "has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition" (296 N. Y. at p. 253). That the rights and privileges of "a citizen of good repute and standing" (R. 28) are subject to the "mere will of another" offends the basic concept of the constitution, that this is "a government of laws and not of men" (*Yick Wo* v. *Hopkins*, 118 U. S. 356 at p. 370).

POINT I.

The right to participate in pari-mutuel as authorized by the statute is a privilege within the equal protection of the laws.

All other betting being forbidden by the State Constitution, the statute creates a special privilege. As such, it must meet the requirements of the equal protection of the laws. It has been held that equal protection requires all persons to be treated alike "both in the privileges con-

ferred and the liabilities imposed" (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 at p. 559); and that all are entitled to "the same privileges under the same conditions" (*Barbier* v. *Connolly*, 113 U. S. 27 at p. 31). The "discrimination can be said to impair that equal right which all can claim in the enforcement of the laws", it was held in *Soon Hing* v. *Crowley* (113 U. S. 703 at p. 709), when the statute accords "different privileges under the same conditions".

It is no answer to petitioner's claim of "equal right" to say that the privilege of betting is not a matter of convenience or necessity to him. For whatever it is, petitioner is entitled to the same privilege as a matter of the equal protection of the laws. As this Court said in *Barbier* v. *Connolly* (113 U. S. 27 at p. 31), "no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances".

It is likewise no answer to petitioner's claim of "equal right" to say that in the exercise of the police power the State could prohibit pari-mutuel betting altogether. Having chosen as a matter of policy to permit it, it is not within the police power of the State to permit it to some and arbitrarily to deny it to others. So this Court held in *Connolly* v. *Union Sewer Pipe Co.* (184 U. S. 540), wherein it was written (at p. 558):

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which as often stated by this court, were not included in the grants of power to the general government, and therefore were rserved to the states when the constitution was obtained. * * * The state has undoubtedly the power, by appropriate legislation, to pro-

> tect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Moreover, the Rules and Regulations adopted by the New York State Racing Commission show that all legitimate ends of supervision in the exercise of the police power can, apparently, be accomplished without arbitrary power to exclude. For the Racing Commission requires exclusion only of those who are "known or reputed to be" bookmakers. Section 30(b) of Article VI of these Rules and Regulations provides, in pertinent part, as follows:

> "No person who is known or reputed to be a bookmaker * * * shall enter or remain upon the premises of any licensed Association conducting a racing meet under the jurisdiction of the Commission; and all such persons shall upon discovery or recognition be forthwith ejected."

And in this connection, it should be remembered that Special Term found that petitioner is "a citizen of good repute and standing" (R. 28) and that both the Appellate Division (R. 42) and the Court of Appeals (296 N. Y. 249 at p. 253) accepted that finding. Indeed, that fact is undisputed in the record (R. 28).

POINT II.

Since the statutory privilege is confined in its operation to licensed race tracks, all must be accorded equal opportunity for admission in order to make the statutory privilege equally available to all.

Not all discrimination is prohibited. Only arbitrary discrimination—"the play and action of purely personal and arbitrary power" (*Hayes* v. *Missouri*, 120 U. S. 68 at p. 71)—is prohibited. For the idea that anyone's rights are subject to the "mere will of another" offends the basic concept of the constitution, that this is "a government of laws and not of men" (*Yick Wo* v. *Hopkins*, 118 U. S. 356 at p. 370).

It is, thus, one thing to prescribe that those who wish to take advantage of their statutory privilege of pari-mutuel betting must do so within the confines of a licensed race track, even though this might discriminate against those who cannot conveniently come to the outskirts where the tracks are usually located and against those who cannot pay the price of admission. For it is necessary to confine the area of pari-mutuel betting in order effectively to supervise it and it is proper to permit a charge for admission in order to maintain the necessary race tracks for that purpose (*People* v. *Sullivan*, 60 Cal. App. 2nd 539). But it is quite another thing to prescribe that one who meets these conditions, that is to say, one who comes to the race track and offers to pay the price of admission, may nevertheless be denied the privilege of betting by the arbitrary act of the owner of the race track in refusing him admission without cause. If, as appears, the owner as licensee exercises official power to such an extent as to subject it equally with the state to the constitutional obligation of equal protection of the laws, then this constitutes a denial thereof. For it was

held by the Court of Appeals that the licensee may admit some and "exclude others solely of his own volition" (296 N. Y. 253). And the statute prohibits such betting outside of a race track.

This Court has frequently had occasion to point out that, where a statute is confined in its operation to a particular place, equal protection requires that all must be accorded the equal privileges of the statute in that place (*Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hayes* v. *Missouri*, 120 U. S. 68). Thus, in *Barbier* v. *Connolly*, this Court wrote (at pp. 30-31):

> "The specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of firewardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions, and are entitled to the same privileges under similar conditions."

And in *Hayes* v. *Missouri*, the same point was restated in these words (120 U. S. 68 at pp. 71-72):

> "The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

POINT III.

At least to the extent of the monopoly created by the license, a pari-mutuel licensee exercises official power which subjects him equally with the State to the obligation of the equal protection of the laws.

If the statute were to provide in express terms that pari-mutuel betting at licensed race tracks is permitted to all except the petitioner, there could be no doubt that it would infringe the Fourteenth Amendment. Could the same result be accomplished by licensing others to administer the act and by giving the licensees arbitrary power to exclude petitioner from participation? *Qui facit per alium facit per se.*

That such infringement may be shown by the uneven "administration" of a statute that is valid on its face, is the settled law of this Court (*Kotch* v. *Board of River Port Pilot Com'rs*, No. 384, October Term, 1946, Decided March 31, 1947; *Yick Wo* v. *Hopkins*, 118 U. S. 356). In the *Yick Wo* case, this Court wrote (pp. 373-374):

> "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

Applying the rule just quoted to the case at bar, it remains to be seen whether the instant statute is being administered "by public authority," for it is not denied that it is being done by "an unequal hand."

It is equally settled that within the quoted rule a statute may be considered as being administered by public authority where the "agencies are invested with an authority independent of the will of the association in whose name they undertake to speak," even though the agents are not, strickly speaking, state officers. Holding that for the purpose of voting in a primary, a political party was not a private club and was obliged to accord equal opportunity, Mr. Justice Cardozo explained this point in *Nixon* v. *Condon* (286 U. S. 73, at pp. 88-89) as follows:

> "The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power. * * * The test is not whether the members of the executive committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."

The fact that the statute permits pari-mutuel betting only at a licensed race track and expressly prohibits it anywhere else brings about two results. It not only grants the licensees a privilege, but it also grants them a monopoly. At least to the extent of the monopoly, the licensed race track operator is "invested with an authority independent of the will of the association." For surely the monopoly depends solely upon the statute. At least to the extent of the monopoly, therefore, the licensees become, again in Mr. Justice Cardozo's phrase, "the repositories of official power." And as such, like the state itself,

the licensees may not apply official power with unequal hand.

It is no answer to this to say that a race track is private property. For it is not claimed that an obligation to accord equal accommodation attaches to the mere ownership of a race track. The claim is that such obligation attaches to the license to conduct pari-mutuel betting. These licenses are not forced on race track proprietors. They are, on the contrary, much coveted by them, because the monopoly created by the licenses is enormously profitable. Section 9 of the New York State Pari-Mutuel Law, as last amended (Section 9, Chapter 254, Laws 1940, as last amended by Chapter 339, Laws 1946) provides that 6% of the total pool in the first zone and 5% of the total pool in the second zone shall be paid by the licensees who conduct pari-mutuel to the State and that 4% of the total pool in the first zone and 5% of the total pool in the second zone shall be retained by the licensees for their "own use and purposes." The World Almanac, 1947, page 40, shows that New York State's share of the pari-mutuel pools for the years 1945-1946, was $46,859,267.84. From this figure it becomes apparent how enormously profitable the monopoly was to the licensees. The income from the pari-mutuel monopoly to the licensed race track owners ranks high among the incomes of utilities during the same period.

Nothing more here relevant was in issue or decided in *Marrone* v. *Washington Jockey Club* (227 U. S. 633) or in *Western Turf Assoc.* v. *Greenberg* (204 U. S. 359) than that—as private owner—a race track proprietor may exclude any one at his pleasure. The point here is that he may not do so—as pari-mutuel licensee.

POINT IV.

The chief error below lurks in the failure to perceive that at least to the extent of the monopoly created thereby, a pari-mutuel license is a franchise, subject to equal accommodation.

One phase of the principle elaborated in the quotation from *Nixon* v. *Condon, supra,* is more bluntly stated by the familiar proposition that a grant of a monopoly is a grant of a franchise, which requires equal accommodation. It was the failure to give effect to the monopoly aspect of a pari-mutuel license that led the Court below astray. For the New York Court of Appeals does not deny the obvious proposition that if the pari-mutuel license is a franchise, then the licensee must accord equal accommodation. The holding of that Court is that the license is not a franchise. In its opinion (296 N. Y. at p. 255),

> "A franchise is a special privilege, conferred by state on an individual, which does not belong to the individual as a matter of common right."

The reason why the pari-mutuel license was held not to be a franchise is stated in its opinion, as follows (296 N. Y. at p. 256):

> "Observing, however, that the conduct of races for stakes had long been declared illegal 'except as specially authorized,' plaintiff argues from that that the license was in effect a franchise, since it granted a privilege not previously enjoyed by common right. That, though, overlooks the fact that the privilege of conducting horse races for stakes does exist at the common law, that it is taken away only by stat-

> ute, and that the statute's prohibition is removed only under certain circumstances and upon compliance with specified conditions. (See *Corrigan* v. *Coney Island Jockey Club, supra;* cf. *Marrone* v. *Washington Jockey Club, supra; Western Turf Association* v. *Greenberg,* 204 U. S. 359.) Consequently, the license, instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute."

It is not apparent why a special privilege is any the less a special privilege, merely because it restores a pristine common law right, which is denied to all others by the State Constitution and statute. But even if the license restores a common law right, yet it restores it with a monopoly. Whatever may be said of the common law right to bet, certainly the monopoly feature of the license is solely a creature of the statute. At least to the extent of the monopoly that such a license grants, therefore, the license is a franchise even within the meaning of that term as defined in the opinion of the New York Court of Appeals.

By the same token may be distinguished the bathhouse license in *Aaron* v. *Ward* (203 N. Y. 351) and the theatre license in *Woollcott* v. *Shubert* (217 N. Y. 212), as well as all the other licenses cited by the Court of Appeals' opinion. It is not illegal to go surf bathing outside of a licensed bathhouse; it may be done all along the surf. So, too, it is not illegal to do a play outside of a licensed theatre; it may be done at home, at school, at church, in a grove and at any other convenient place. These licenses and the others cited by the Court of Appeals grant permits, but they do not grant monopolies.

POINT V.

The substantial Constitutional question of the equal protection of the laws in the circumstances disclosed by the petition has not heretofore been determined by this Court. It was decided by the New York Court of Appeals in conflict with principles of decisions of this Court. It is not only in the interests of substantial justice, but it is also in the interests of the integrity of the basic guaranties of the Constitution that this case should be reviewed by this Court.

There is more danger to Constitutional rights to be apprehended from invidious rulings than from frontal attacks. Today discrimination is directed against the privilege of betting; tomorrow, against another privilege. Thus is set in motion that "corrosive process" of undermining the basic guaranties of the Constitution against which this Court has again and again sounded warning.

The privilege at bar should not be less an object of Constitutional solicitude than a privilege that holds a higher regard in the opinion of the community. For there very rarely is need for Constitutional protection of privileges in respect of activities which the community esteems. Mr. Justice Holmes said of another of the great guaranties of the Constitution, in a memorable dissent, that we should be eternally vigilant against attempts to check the expression of opinions that we "loathe" (*Abrams* v. *United States*, 250 U. S. 616, 630). For the test of the integrity of the Constitutional guaranty is freedom of the speech that is not favored. So, too, the test of the integrity of the guaranty of equal protection of the laws is the protection of the privilege that is not esteemed.

While pari-mutuel betting can hardly be said to be a privilege that is esteemed and in some communities it is altogether forbidden, yet in New York it is a privilege that is established by a State statute. As such, that is to say,

as a statutory privilege, the Constitutional protection of it as part of the equal protection of the laws transcends any question of the social aspects of pari-mutuel betting. New York State having as a matter of policy established by law the privilige of pari-mutuel betting, it is no answer to petitioner's claim to say that the privilege is not a matter of convenience or necessity to him. Whatever it is to anybody, petitioner is entitled to a like privilege as a matter of the equal protection of the laws.

There is no decision of this Court which rules the question. The New York Court of Appeals' decision conflicts with principles laid down in decisions of this Court, as is shown in the preceding points. The petition presents a substantial question based upon the Constitutional guaranty of the equal protection of the laws. In the recent world travail it was embattled democracy's proudest boast that all stand equal before its laws. The decision below sanctions the exercise of arbitrary discrimination under license of a State statute. It is unfortunate that not always is a stirring cause the vehicle of an important Constitutional question. But the importance is in the Constitutional question. No matter what the cause out of which it arises, the transcendent Constitutional question presented by the exercise of concededly arbitrary power to discriminate against "a citizen of good repute and standing" (R. 28) under license of a State statute is worthy of a hearing and final decision by this Court.

CONCLUSION.

The Petition for the Writ Should Be Granted.

Respectfully submitted,

RAPHAEL H. WEISSMAN,
Attorney for Petitioner.

Brooklyn, New York, June 16, 1947.

APPENDIX.

NEW YORK COURT OF APPEALS' OPINION.
(296 N. Y. 243)

COLEMAN F. MADDEN, Appellant, *v.* QUEENS COUNTY JOCKEY CLUB, INC., Respondent.

Decided April 17, 1947.

APPEAL from a judgment in favor of defendant, entered November 14, 1945, upon an order of the Appellate Division of the Supreme Court in the second judicial department which (1) reversed, on the law, an order of the Supreme Court at Special Term (NOVA, J.), entered in Queens County, granting a motion by plaintiff for a temporary injunction restraining defendant from preventing plaintiff from entering defendant's race track at Aqueduct and attending the horse races and patronizing the pari-mutuel betting conducted thereon, and denying defendant's cross motion for a dismissal of the complaint, on the law, and (2) denied plaintiff's motion and granted defendant's cross motion.

Raphael H. Weissman for appellant.

Conrad Saxe Keyes, Cyrus S. Jullien and *Joseph B. Cavallaro* for respondent.

Martin A. Schenck, Harold C. McCollom and *Kenneth W. Greenawalt* for Westchester Racing Association, The Saratoga Association, Metropolitan Jockey Club and Empire City Racing Association, *amici curiae,* in support of respondent's position.

FULD, J. "Owney" Madden was named by one Frank Costello in 1943 as a bookmaker with whom he placed bets. "Coley" Madden, plaintiff herein, a self-styled "patron of

the races", was barred by defendant from its Aqueduct Race Track in 1945, under the mistaken belief that he was Costello's bookmaker. Plaintiff thereupon sought a declaratory judgment declaring that he has a right, as citizen and taxpayer—upon paying the required admission price —to enter the race course and patronize the pari-mutuel betting conducted thereon. Defendant, on the other hand, asserted an unlimited power of exclusion. Special Term, finding that plaintiff was a citizen of good repute and standing, decided that the complaint stated a cause of action and entered an order enjoining defendant from keeping plaintiff off the race track. The Appellate Division, reversing, dismissed the complaint.

The question posed—which this court explicitly declined to consider in 1897, in *Grannan* v. *Westchester Racing Assn.* (153 N. Y. 449, 459)—is whether the operator of a race track can, without reason or sufficient excuse, exclude a person from attending its races. In our opinion he can; he has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin.

At common law, a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. (See e.g., *People* v. *King*, 110 N. Y. 418, 427; see, also, Wyman, Public Callings and the Trust Problem, 17 Harv. L. Rev. 156, 217.) On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. (See, e.g., *Woollcott* v. *Shubert*, 217 N. Y. 212; *Aaron* v. *Ward*, 203 N. Y. 351; *People ex rel. Burnham* v. *Flynn*, 189 N. Y. 180; *Collister* v. *Hayman*, 183 N. Y. 250.) A race track, of course, falls within that classification. (See *Marrone* v. *Washington Jockey Club*,

227 U. S. 633; [*Edward J.*] *Madden* v. *Queens County Jockey Club, Inc.*, 175 Misc. 522; *Corrigan* v. *Coney Island Jockey Club*, 2 Misc. 512.)

The common-law power of exclusion, noted above, continues until changed by legislative enactment. In this State, a statute—explicitly covering "race courses"—limits the power by prohibiting discrimination on account of race, creed, color, or national origin. (Civil Rights Law, § 40; see, also, Penal Law, §§ 514, 700.) That, then, is the measure of the restriction.

Plaintiff, however, asserts a right founded upon the constitutional guaranty of equal protection of the laws. The argument is based on two assumptions, first, that the license to conduct pari-mutuel betting constitutes the licensee an administrative agent of the State in the execution of the law, and, second, that the license to conduct horse racing is a franchise to perform a public purpose.

The first assumption is quickly disposed of. Section 9 of the Pari-Mutuel Revenue Law (L. 1940, ch. 254, § 9, as amd. by L. 1946, ch. 339) provides in substance that the licensee shall retain 10% of the total deposits and pay therefrom "to the state tax commission as a reasonable tax by the state for the privilege of conducting pari-mutuel betting", an amount equal to a certain percentage of the total pool. It should be noted that the tax is thus imposed not on the bettor for the privilege of *betting*—analogous to the imposition of a sales tax upon the purchaser from a retail store—but upon the licensee for the privilege of *conducting* pari-mutuel betting. Adopting plaintiff's position, it would be equally valid to argue that every licensee, theatre manager, cab driver, barber, liquor dealer, dog owner—to mention a few—must be regarded as "an administrative agency of the state" in the conduct of his everyday business simply because he pays a tax or fee for his license.

Plaintiff's second assumption—that the license is a franchise—requires more lengthy treatment. There is

little need to cite authority for the proposition that a race track is normally considered a place of amusement and that—with the possible exception of ancient Rome—amusement of the populace has never been regarded as a function or purpose of government. Horse racing does not become a function of government merely because, in sanctioning it, the Legislature anticipated a consequent, though incidental, advantage to the public in "improving the breed of horses." (L. 1926, ch. 440, §1; cf. *People ex rel. Empire City Trotting Club* v. *State Racing Commission*, 120 App. Div. 484, 485-486, affd. 190 N. Y. 31.) There is, then, nothing inherent in the nature of horse racing which makes operation of a race track the performance of a public function. If plaintiff's assumption were valid, it would follow that the mere fact of licensing makes the purpose a public one and the license in effect a franchise. Such, however, is not the law. (*Woollcott* v. *Shubert, supra,* p. 216; *Collister* v. *Hayman, supra,* p. 253.)

Plaintiff's argument results from confusion between a "license", imposed for the purpose of regulation or revenue, and a "franchise". A franchise is a special privilege, conferred by State on individual, which does not belong to the individual as a matter of common right. (See *Smith* v. *The Mayor*, 68 N. Y. 552, 555; *Penn-York Natural Gas Corporation* v. *Maltbie,* 164 Misc. 569, 573; *City of Tulsa* v. *Southwestern Bell Telephone Co.*, 75 F. 2d 343, 350.) It creates a privilege where none existed before, its primary object being to promote the public welfare. (See *e. g., Southern Ry. Co.* v. *South Carolina Public Service Commission,* 31 F. Supp. 707, 711; *City of Oakland* v. *Hogan,* 41 Cal. App. 2d 333, 347.) A familiar illustration is the right to use the public streets for the purpose of maintaining and operating railroads, waterworks and electric light, gas and power lines.

A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare. The grant of a license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the licensee under obligation to the public. (*Woollcott* v. *Shubert, supra; Collister* v. *Hayman, supra*). In the *Woollcott* case (*supra*) for instance, where the power of a theatre owner to bar a critic from his theatre was upheld, this court wrote (217 N. Y., at p. 216): "At the common law a theatre, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, is in no sense public property or a public enterprise. * * * The proprietor does not derive from the state the franchise to initiate and conduct it. His right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded." Likewise, race tracks may well be affected with a public interest sufficient to justify governmental licensing or other regulation. Recognition of a public interest, however, is neither recognition nor acknowledgment that the State is a partner in the business of horse racing or that the race track operator is the State's administrative agent to collect revenue.

Observing, however, that the conduct of races for stakes had long been declared illegal "except as specially authorized," plaintiff argues from that that the license was in effect a franchise, since it granted a privilege not previously enjoyed by common right. That, though, overlooks the fact that the privilege of conducting horse races for stakes does exist at the common law, that it is taken away only by statute, and that the statute's prohibition is removed only under certain circumstances and upon com-

pliance with specified conditions. (See *Corrigan* v. *Coney Island Jockey Club, supra;* cf. *Marrone* v. *Washington Jockey Club, supra; Western Turf Association* v. *Greenberg* 204 U. S. 359.) Consequently, the license, instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute.

In short, plaintiff's right to equal accommodation must rest either upon common law or upon statutory provision. No such right existed at common law and the Legislature has not chosen to create one. (Civil Rights Law, §§ 40, 40-b.)

The judgment should be affirmed, with costs.

Loughran, *Ch. J.*, Lewis, Conway, Desmond, Thacher and Dye, *JJ.*, concur.

Judgment affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1506. 142

COLEMAN F. MADDEN,

Petitioner,

against

QUEENS COUNTY JOCKEY CLUB, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

JOSEPH B. CAVALLARO,
Attorney for Respondent,
189 Montague Street,
Brooklyn 2, N. Y.

CONRAD SAXE KEYES,
CYRUS S. JULLIEN,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

SUBJECT INDEX

CASES CITED.

STATUTES AND MISCELLANEOUS AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1506.

COLEMAN F. MADDEN,

Petitioner,

against

QUEENS COUNTY JOCKEY CLUB, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

POINT I.

The decision of the Court of Appeals is reversable only by certiorari, and not by writ of error.

The petitioner makes no claim of invalidity of any Statute of the State of New York. His attack is upon the decision of the Court of Appeals upon the ground that the Statutes of the State of New York create certain rights in the petitioner of which he has been deprived by the decision of the Courts of the State of New York.

Such a contention may be passed upon by the United States Supreme Court only under 28 U. S. C. A. Section 344, Subdivision (b) of the Judicial Code, wherein review is authorized "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution" etc.

POINT II.

The granting of a writ of certiorari is discretionary.

Philadelphia & Reading Coal Co. vs. *Gilbert,* 245 U. S. 162.

POINT III.

This case involves no question which should appeal to the discretion of the Court.

U. S. Fidelity & Guaranty Co. vs. *Oklahoma,* 250 U. S. 111;
Deming vs. *Carlisle Packing Co.,* 226 U. S. 102.

Petitioner complains that respondent's act in excluding him from the race track is discriminatory and arbitrary thereby denying him the equal protection of the laws (R. 25, 26). Admittedly there has been no discrimination within the provisions of Section 40 Civil Rights Law based on race, creed, color or national origin (R. 44).

There is no case of mistaken identity involved. Respondent intended to exclude "Coley" Madden, the petitioner, "a self styled patron of the races" (R. 56).

Under the circumstances, there is no Federal Constitutional question involved or to be reviewed herein since Section 1 of Amendment XIV of the United States Constitution in granting the equal protection of the laws does not abrogate respondent's common law right to exclude.

The common law right of exclusion at race tracks has been long recognized. The English Court of Exchequer in *Wood* v. *Leadbitter,* 13 Mees. & W. 838, held that a ticket to witness races is a mere revocable license and that no action lies for damages for the exclusion of the person who

purchased the ticket, despite the fact that he had not in any way misconducted himself.

The Supreme Court of New Jersey in *Shubert* v. *Nixon Amusement Co.* (1912), 83 At. Rep. 369, referred to *Wood* v. *Leadbitter, supra,* as a leading case on this subject.

The *Leadbitter* case was also cited with approval in *Meisner* v. *Detroit, Belle Isle & Windsor Ferry Co.,* 154 Mich. 545 where the defendant, the owner of a ferry and an island in the Detroit River, which it operated as an amusement park, refused to accept the plaintiff as a passenger who brought action for his exclusion. The Court said:

> "Counsel do not disagree as to the law of common carriers of passengers. Any one, no matter what his character is or has been, presenting himself for transportation to such carrier, is, upon paying his fare, entitled to be transported, provided there is nothing in his condition or conduct when he presents himself to justify his exclusion. This rule does not apply to the owners of theatres, circuses, race tracks, private parks and the like, unless there be some statute regulating their business, and providing the terms and conditions under which that company's business may be carried on. It appears to be settled by authorities that these private enterprises, under the control of private parties, and that they may license whomsoever they will to enter, and refuse admission to whomsoever they will. Their own interests prompt fair and just treatment to those whom they invite to their places of pleasure. The right given to enter such places is a mere license, and after the right to enter is granted, it may be revoked. So, also, the right to enter may be refused to any one. * * *
>
> "*Wood* vs. *Leadbitter, supra,* is very similar in its facts to this case. It is cited with approval in several of the above cited cases. Pleasure grounds

of this character are no necessities of life, any more than are theatres and race tracks; and, unless restrained by some provision of their charters, their owners can impose any terms of admission they choose."

See also:

Collister v. *Hayman*, 183 N. Y. 250 (1905);
Luxenberg v. *Keith & Proctor A. Co.*, 64 Misc. 69 (1909);
Peo. ex rel. Burnham v. *Flynn*, 189 N. Y. 180 (1907);
Woollcott v. *Shubert*, 217 N. Y. 212 (1916);
Aaron v. *Ward*, 203 N. Y. 351 (1911).

This Court in refusing a writ in *46th Street Theatre Corp. and ano.* v. *Christie*, (Case No. 87), 323 U. S. 710, upheld the constitutionality of Section 40-b Civil Rights Law which by its terms applies to designated places of amusement and the fact that the New York Legislature in enacting Section 40-b omitted race tracks from such designated places of amusements shows an intent to reserve to the Racing Associations their common law right to exclude

"*Inclusio unius est exclusio alterius*"

(A) The petitioner herein complains that the decision deprives him of the equal protection of the laws, because the respondent has excluded him from its race track and incidentally, has thereby prevented him from engaging in pari-mutuel betting.

He complains of no statute nor of any official action. His complaint is solely against the Queens County Jockey Club for refusing to recognize what the petitioner deems to be a constitutional right to bet at the race track.

Petitioner advances the argument that in operating the pari-mutuel system of betting the respondent is acting as an official or agent of the State (Brief, pp. 14, 15, 22, 23). If that was so, then the State as the principal would be obliged to furnish the facilities for such operation and be responsible for losses in *minus pools* and would otherwise be obligated as principal.

The fact of the matter is that the State shares neither in profits, as such nor in losses, if any. The interest of the State is in all respects *a tax* with all the characteristics of taxation (Section 7561, Unconsolidated Laws, Racing Law).

The constitutional provision excepts from the general prohibition against gambling "pari-mutuel betting on horse races as may be prescribed by the Legislature and from which the State shall derive a reasonable revenue for the support of government, * * *" (Art. I, Sect. 9, N. Y. Constitution).

This is not a general grant of a privilege but a limited one which may be exercised only within constitutional and statutory limits.

Neither the constitutional amendment (Art. I, Sect. 9, N. Y. Constitution) nor the enabling legislation (Pari-Mutuel Revenue Law, Section 7561 *et seq.*, Unconsolidated Laws, Racing Law) restricts the respondent in the exercise of its common law right to select its own patrons. In fact the clear inference of the Civil Rights Law (Sections 40 and 40-b) is that race tracks shall continue to exercise all of its common law rights of exclusion except by reason of race, creed, color or national origin.

In the *Application of Stewart*, 174 Misc. 902, affirmed 260 App. Div. 979, appeal denied, 261 App. Div. 851, the Court said at page 903 of 174 Misc:

> "*No right to pari-mutuel betting itself was created by the Constitution.* What was created is an

> exception to the general prohibition which had theretofore removed all gambling from the scope of legislative sanction or permission. With the prohibition removed against this type of gambling the field of legislative action upon the subject was opened. The Legislature was freed from its former restraint and it became competent for it to authorize if it deemed proper, and to regulate, pari-mutuel betting on horse races."

Petitioner does not question the constitutionality of the enabling legislation (Pari-Mutuel Revenue Law, Section 7561 *et seq.*, Unconsolidated Laws, Racing Law).

(B) The question of petitioner's right to enter the race track and bet by means of the pari-mutuel machines is purely a matter of state law and presents no federal question.

The laws in question will be found in the "Unconsolidated Laws" of the State of New York, under the title of "Racing"—Section 7501-7520; "Pari-Mutuel Revenue Act"—Sections 7561-7583 and under the "Civil Rights Law" of the State of New York—Sections 40 and 40-b.

Under Section 40, Civil Rights Law, an owner of a race course and other places enumerated therein, may not exclude a person because of race, creed, color or national origin. The constitutionality of this section was upheld as early as 1888 in *People* v. *King,* 110 N. Y. 418.

Under Section 40-b, no owner of places of public entertainment and amusement enumerated therein may refuse admittance to any person over 21 years of age who presents a ticket of admission or shall eject such a person except for the causes stated therein. The places of public entertainment and amusement do not include "race courses".

As was said by the Appellate Division (R. 42, 43, 44):

"Persons not engaged as common carriers or other occupations which subserve the convenience or necessity of the public are at liberty to select their patrons (People *ex rel.* Burnham *v.* Flynn, 189 N. Y. 180; Aaron *v.* Ward, 203 N. Y. 351; Woollcott v. Shubert, 217 N. Y. 212; Noble *v.* Higgins, 95 Misc. 328, 329), save in so far as inhibited by statute. (Civil Rights Law, art. 4, sec. 40, 40-b.) 'The difference between public callings and private business is a distinction in the law governing business relations which has always had and will always have most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business may always refuse to sell if they please.' (1 Wyman on Public Service Corporations, p. 2) * * *

"Although the nature of the business is such as to place it within a field affected by public interest to an extent that it is properly subject to legislative regulation (People *v.* Budd, 117 N. Y. 1, 7; Munn *v.* Illinois, 94 U. S. 113; see Western Turf Association *v.* Greenberg, 204 U. S. 359), *the Legislature has not seen fit to provide, as to race courses, that the public be admitted without discrimination.* Its failure so to do (see Civil Rights Law, sec. 40-b) is in significant contrast to the express inclusion of 'race courses' in the named places of public accommodation, resort or amusement from which persons may not be barred on account of race, creed, color or national origin. (Civil Rights Law, Sec. 40; Grannan *v.* Westchester Racing Assn., 153 N. Y. 449, 465; Collister *v.* Hayman, 183 N. Y. 250, 254, 255.) Plaintiff does not claim that he was barred for any of those reasons." (Italics ours.)

(C) These laws have been construed to recognize and continue the well settled common law right of the proprietor of a place of amusement to exclude any one whom it chooses, with or without any reason.

This right is one of long recognition by the Supreme Court of the United States as well as the Courts of the State of New York.

Marrone vs. *Washington Jockey Club,* 227 U. S. 633-636;

Corrigan vs. *Coney Island Jockey Club,* 2 Misc. (N. Y.) 512;

Grannan vs. *Westchester Racing Association,* 153 N. Y. 449;

Woollcott vs. *Schubert,* 217 N. Y. 212;

Christie vs. *46th St. Theatre Corp.,* 265 App. Div. 255, affirmed 292 N. Y. 520, petition for writ denied, 323 U. S. 710 (Case No. 87).

The extent to which Respondent's rights are restricted or enlarged by the Legislature of the State is a purely local question.

(D) The construction placed upon the laws of the state by the highest court of the state, is binding upon the Supreme Court.

Supreme Lodge vs. *Meyer,* 265 U. S. 30;

American Railway Express Co. vs. *F. S. Royster Guano Co.,* 273 U. S. 274;

First National Bank vs. *Ayres,* 160 U. S. 660;

King vs. *West Virginia,* 216 U. S. 92.

(E) Petitioner's common law rights have not been enlarged by the enactment of the provisions for pari-mutuel betting.

1. The question as to the effect of the Pari-Mutuel statute upon the rights of the petitioner has been decided

adversely to the petitioner by the Court of Appeals. This decision is binding upon this Court.

The statutes in question neither expressly permit or forbid discrimination against anyone, except for reasons of race, creed, color or national origin.

The law permitting Pari-Mutuel betting was passed pursuant to the New York State Constitution, which permits this type of betting at race tracks only and forbids all other forms of gambling. N. Y. Constitution Art. I, Sec. 9; as amended in November 1939.

2. Betting has generally been the subject of regulation and even suppression. The indulgence in this pastime is not a matter of fundamental or constitutional right entitling every citizen to enter upon any place or property in which such pastime is engaged.

Otis vs. *Parker,* 187 U. S. 606;
See generally under the title Theatres and Shows, 62 Corpus Juris p. 843, *et seq.* Gaming, 27 Corpus Juris p. 996 *et seq.*

3. The provisions of the Pari-Mutuel Law follow closely other statutes relating to sports and amusements of various kinds.

"Racing Law", Unconsol. Laws, Sect. 7501;
"Pari-Mutuel Law", Unconsol. Laws, Sect. 7561;
"Sports" (Boxing), Unconsol. Laws, Sect. 9101;
"Alcoholic Beverage Law", Consolidated Laws. Chap. 33.

4. The Racing Associations receive no "franchise" but merely a license which must be applied for and issued annually, and the conduct of Pari-Mutuel betting must like-

wise be licensed in the same way and for the same period, for simultaneous operation.

Racing Law, Sect. 7508, Unconsol. Laws;
Pari-Mutuel Law, Sect. 7563, Unconsol. Laws.

As a matter of fact the Court of Appeals held that respondent does not have a franchise (R. 58, 59) and as its decision is binding on this Court, it cannot be urged by the petitioner that he has been discriminated against on that ground.

There is no more of a monopoly in reference to Pari-Mutuel betting than there is in racing itself. In fact the two are inseparably connected by the very nature of their activities and the provisions of the Statutes (*supra*). Both are conducted by private corporations although subject to regulation because of their relationship to the public. Both are subject to taxation for the benefit of the State.

But since admission to the race track is still subject to the discretion of the owner, so Pari-Mutuel betting at the race track, being an incident to the sport of racing, and permitted only within the race track enclosure, must likewise be subject to the right of the track owner to exclude.

The conduct of racing itself is limited by the statute to such race tracks as may be licensed and under such conditions as may be prescribed by the statutes and the New York State Racing Commission. Yet concededly the track owners may exclude any person with or without cause provided such exclusion is not because of race, creed, color or national origin.

The right to gamble is no more sacred and fundamental than the right to attend the races or to go to the circus.

In passing it is well to note that the Pari-Mutuel Revenue Law, Sections 7561 *et seq.*, Unconsolidated Laws, does

not make any reference or provision for admission or exclusion of patrons. It was passed by the Legislature to provide the State with a reasonable revenue for the support of government. However, under Section 7507 of the Unconsolidatd Laws (Racing) the Legislature empowered the State Racing Commission to adopt Rules and Regulations in its supervision of race meetings. Pursuant thereto the New York State Racing Commission enacted Section 30 (b), Article VI, which requires respondent to exclude those who are "known or reputed to be" bookmakers. Said Rule reads as follows:

> "(b) No person who is known or reputed to be a bookmaker or a vagrant within the meaning of the statutes of the State of New York, or a fugitive from justice, or whose conduct at a race track in New York, or elsewhere, is or has been improper, obnoxious, unbecoming or detrimental to the best interests of racing, shall enter or remain upon the premises of any licensed Association conducting a racing meet under the jurisdiction of the Commission; and all such persons shall upon discovery or recognition be forthwith ejected."

The Courts of the State of New York are required to take judicial notice of these Rules and Regulations (Section 344a Civil Practice Act).

The obligations imposed upon the Racing Associations to police their race track enclosures make it imperative for them to retain full control over admission thereto.

POINT IV.

The decision of the Court of Appeals does not violate the Fourteenth Amendment of the Constitution of the United States.

The clause of the Fourteenth Amendment relied upon by petitioner is found in Section 1:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The petitioner contends that because the respondent is permitted to exercise the right to exclude petitioner from its race track and incidentally from the Pari-Mutuel machines operated in connection therewith, he is thereby deprived of the equal protection of the laws.

(A) This clause of the Constitution is aimed at discriminatory legislation, and not at private or personal discrimination.

> "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation".
>
> *McPherson* vs. *Blacker,* 146 U. S. 1-39.

The amendment does not apply to individual or corporate infringements of the rights guaranteed by it.

> *Snowden* vs. *Hughes,* 321 U. S. 1-7.
>
> "The protection * * * does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his State established by State law."

In cases of persistent and intentional discrimination *by public officials*, their action may be subject to the same infirmity as though taken by the legislature itself. But this rule relates to public officers who owe a duty of impartial administration to all the public. To constitute unjust discrimination, the action must be that of the State or its representative.

Snowden vs. *Hughes*, 321 U. S. 1, at page 16.

But discrimination by private individuals against persons of a particular race is not violative of the Constitution —though it may be prevented by legislation.

Corrigan v. *Buckley*, 299 Fed. 899-901; 271 U. S. 323.

In *U. S.* vs. *Cruikshank*, 92 U. S. 542, the Court said at page 554:

> "The fourteenth amendment prohibits a State from depriving any person of life, liberty or property without due process of law; *but this adds nothing to the rights of one citizen as against another.*" (Italics ours.)

U. S. vs. *Harris*, 106 U. S. 629-638.

And in *Duncan* vs. *Missouri*, 152 U. S. 377, at page 382:

> "* * * due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; * * * "

POINT V.

The contentions of petitioner are fallacious.

1. The petitioner claims that the statute allowing betting creates a special privilege and therefore must grant to all the equal protection of the laws.

Inasmuch as the statute is silent on the subject, it provides for no discrimination in favor of one person as against another and therefore applies equally to all.

Petitioner does not contend and has not met the burden of showing that the statute is arbitrary. It was held by this Court in *Whitney* v. *California*, 274 U. S. 357, at page 369:

> "It is settled by repeated decisions of this court that the equal protection clause does not take from a state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary; and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Lindsley *v.* National Carbonic Gas Co., 220 U. S. 62, 78, 55 L. ed. 370, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, and cases cited."

The petitioner has no less and no greater rights than any other person respecting the right to enter upon respondent's property.

Petitioner's rights are no different from those of any one else. *No one has the right to enter upon the race track except by permission of the owner.* The law is equally applicable to all persons. The right to exclude may be applied not only to the petitioner, but to any and all other prospective patrons of the race track. His rights are not

infringed—because he has no rights. The special privilege is granted to the race track owner and not to the public generally.

The statutory permission is to engage in a certain type of business under license—not to go upon the race track and engage in betting.

It has been held by this Court that a ticket of admission to a place of amusement is, and always has been, merely a license (*Marrone* v. *Washington Jockey Club,* 257 U. S. 633, 637). In the *Marrone* case this Court said at page 636:

> "But as no evidence of a conspiracy was introduced and as no more force was used than was necessary to prevent the plaintiff from entering upon the race track, the argument hardly went beyond an attempt to overthrow the rule commonly accepted in this country from the English cases, and adopted below, that such tickets do not create a right in rem. 35 App. D. C. 82. Wood *v.* Leadbitter, 13 M. & W. 838. McCrea *v.* Marsh, 12 Gray, 211. Johnson *v.* Wilkinson, 139 Massachusetts, 3. Horney *v.* Nixon, 213 Pa. St. 20. Meisner *v.* Detroit, Belle Isle & Windsor Ferry Co., 154 Michigan, 545. W. W. V. Co. *v.* Black, 75 S. E. Rep. 82, 85. Shubert *v.* Nixon Amusement Co., 83 Atl. Rep. 369. Taylor *v.* Cohn, 47 Oregon, 538, 540. People *v.* Flynn, 114 App. Div. 578, 189 N. Y. 180."

Respondent being a private corporation, conducting a private business upon its own private premises, cannot be said to be exercising a public use. The Pari-Mutuel Revenue Law does not seek to impress upon race tracks a use in favor of the public generally. Only those who are permitted by respondent to enter its race track enclosure may use the facilities provided.

The legislature could not single out the petitioner by law and disqualify him from attending the races or engaging in any other amusement. But it is not obliged to compel the operators of amusement places—including Pari-Mutuel betting—to admit all persons without discrimination. There has been no such right in the public, and none is created by implication. Admission is a matter of favor not of right.

2. The cases relied upon by petitioner relate to actions by legislature or by government officials.

Yick Wo v. *Hopkins*, 118 U. S. 356, relates to the *power of the city government* to restrict the right to engage in business by purely arbitrary requirements, directed against a certain class of people.

Hayes v. *Missouri*, 120 U. S. 68, merely holds that *the law* must be applicable to all alike. In petitioner's case the law operates alike on all but does not deprive respondent of its common law rights.

The law could not authorize the respondent to exclude the petitioner *only*, or any other specified class of people *only*. But it may license the conduct of a business and leave the operator of that business free to debar any person at his pleasure unless the business be in the nature of a public utility operating under a franchise.

Even there it does not appear that the legislature could not authorize refusal of accommodation if not based upon class distinction.

At any rate gambling and betting being subject to statutory regulation, and racing likewise being subject to regulation, the State has power to issue licenses, which does not create in the licensees the status of governmental representatives.

3. Petitioner contends that the license to conduct Pari-Mutuel betting creates a new and different situation and requires admission to be granted to any and all.

The fallacy of this has been pointed out above. The concession that admission to the race track is optional destroys petitioner's contentions. The right to bet is no greater than the right to attend the races. Moreover, respondent does not operate the only race track and Pari-Mutuel betting machinery in the State. Hence there is no monopoly.

POINT VI.

Petitioner still confuses a license with a franchise.

Throughout his petition and brief in support thereof, petitioner uses the words license and franchise interchangeably. While in one breath, petitioner admits that respondent has a license (Brief, pp. 15 and 22), he then argues that "a pari-mutuel license is a franchise" (Brief, p. 25). The Court of Appeals disposed of this confusion when it said at page 59 R.:

> "Plaintiff's argument results from confusion between a 'license', imposed for the purpose of regulation or revenue, and a 'franchise'. A franchise is a special privilege, conferred by State on individual, which does not belong to the individual as a matter of common right. * * *
>
> "A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare."

In his complaint, petitioner alleges that the respondent is exercising a public franchise granted by the state to sub-

serve a public purpose. He then argues that the words "license" or "franchise' are synonymous. The importance which petitioner attaches to this erroneous assertion will be found in Point IV, page 25 of petitioner's brief.

The law is explicit that racing for stakes and operation of pari-mutuels may only be conducted under license issued for specified dates within each calendar year which is revocable for causes stated in the statute (Sections 7508, 7509, 7563 and 7577, Unconsolidated Laws, Racing Law).

The right of a private corporation to exist as a corporate entity is frequently called a franchise, but this is not the sense in which the Court at Special Term in its decision (R. 30), nor the petitioner has used the term franchise. Rather they both emphasize the special franchise, usually granted to public service corporations, which permits the limited exercise of governmental functions such as condemnation, use of public highways, etc.

> *Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212, 226;
> *Trustees of Southampton* v. *Jessup,* 162 N. Y. 122, 126.

A franchise is property with the attributes of property.

> *Eighth Ave. Coach Corp.* v. *City of N. Y.,* 286 N. Y. 84-86;
> *People* v. *O'Brien,* 111 N. Y. 1-39.

By every standard of judicial interpretation as well as by the explicit language of the statute, the respondent operates its racing and pari-mutuels under a license, issued annually. See:

> Opinion of Appellate Division, R. 42 *et seq.;*
> Opinion of Court of Appeals, R. 57 *et seq.*

hift of emphasis on the factors which allegedly
license into a franchise has been made by peti-
conv
this case has progressed, to overcome the effect of
tion
ious Court ruling. The fundamental concept of
eacl
tutional amendment and the enabling legislation
the
nd a privilege to the New York Racing Associa-
is t
onduct pari-mutuel betting incidental to the con-
tion
cing from which the State may derive a revenue
duc
of taxation. It is not a privilege extended to the
by
such, as petitioner argues, as it may only be
pub
y those who are within the race track.
enj

POINT VII.

etition for a writ of certiorari should be denied
upo decisions of the Appellate Division (R., 42-
44) the Court of Appeals of the State of New York
(R. 1).

Da uly 11th, 1947.

Respectfully submitted,

JOSEPH B. CAVALLARO,
Attorney for Respondent,
189 Montague Street,
Brooklyn 2, N. Y.

COLAXE KEYES,
CYJULLIEN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1506 142

COLEMAN F. MADDEN,

Petitioner,

against

QUEENS COUNTY JOCKEY CLUB, INC.,

Respondent.

BRIEF OF WESTCHESTER RACING ASSOCIATION, THE SARATOGA ASSOCIATION, METROPOLITAN JOCKEY CLUB AND EMPIRE CITY RACING ASSOCIATION, AS AMICI CURIAE

MARTIN A. SCHENCK,
HAROLD C. McCOLLOM,
KENNETH W. GREENAWALT,
Attorneys for Amici Curiae.

SUBJECT INDEX

CASES CITED

STATUTES AND MISCELLANEOUS AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1506

COLEMAN F. MADDEN,
Petitioner,
against
QUEENS COUNTY JOCKEY CLUB, INC.,
Respondent.

BRIEF OF WESTCHESTER RACING ASSOCIATION, THE SARATOGA ASSOCIATION, METROPOLITAN JOCKEY CLUB AND EMPIRE CITY RACING ASSOCIATION, AS AMICI CURIAE.

(Page references are to Record unless otherwise indicated.)
(Emphasis ours unless otherwise indicated.)

Preliminary Statement

This brief, in opposition to the Petition for Writ of Certiorari, is submitted by the above-named New York racing associations by consent of the parties to the case. These Associations heretofore have filed briefs herein, as *amici curiae*, in the New York Court of Appeals and in the Appellate Division, Second Judicial Department. (See 296 N. Y. 249; 269 App. Div. 644.) Their situations are similar to that of Respondent.

For reasons herein stated they regard it as important, in the interests of New York racing generally, that this application be denied and that the considered judgment of the highest Courts of the State be accepted as final in such a matter. The state courts are intimately familiar with the local laws and conditions and with the long historical background relating to racing and betting in that state.

Statement of the Case

Respondent is a private New York corporation which owns and operates a running race track at Aqueduct, N. Y. and conducts pari-mutuel betting thereat for its patrons, under licenses from New York State Racing Commission and under the Racing and Pari-Mutuel Laws of that State (R. 23-4).

Petitioner states he is in the business of tungsten mining. He describes himself as a "patron of the races" and of pari-mutuel betting; also, as a citizen of the United States and a resident and taxpayer of New York (R. 9, 23).

Petitioner brought suit seeking a judgment declaring that he "has a right and privilege of entering the race track at Aqueduct and attending the horse races and patronizing the pari-mutuel betting conducted thereon" and permanently enjoining respondent from preventing him "from exercising his said right and enjoying his said privilege" (R. 26-7).

On his complaint and affidavits he moved for temporary injunction (R. 6-7). Respondent cross-moved for dismissal of his complaint for legal insufficiency (R. 21). A Justice at Queens County Supreme Court Special Term granted petitioner's motion and denied the cross-motion with an opinion devoid of legal authorities (R. 4-6, 28-33). On respondent's appeal, the Appellate Division, Second Judicial Department unanimously reversed, with an opinion, denying petitioner's motion for a temporary injunction and granting respondent's cross-motion to dismiss the complaint (R. 39-40, 41-4). A judgment of reversal and dis-

missal was entered thereon (R. 37-8). On petitioner's appeal therefrom, the Court of Appeals unanimously affirmed the judgment of reversal and dismissal, with an opinion, and judgment was entered thereon (R. 47-61).

Petitioner's complaint, as amplified by his affidavits, is as significant in its omissions as in its inclusions. Petitioner does not claim that he was denied admission to respondent's race course on account of his race, color, creed or national origin. He does not allege any violation of his civil rights, set forth in the New York "Civil Rights Law." He does not claim that his right or ability to earn a living or to exercise his calling or occupation has been affected or denied by any act of respondent. So far as appears from his papers, attending horse races and betting thereon is to him, as it is considered generally, simply a matter of amusement. He does not allege that he purchased and presented any ticket of admission, or that he attempted to do so, or that he was barred or ejected after doing so. He says he was ordered to stay away from a race track in Florida in January 1944 and from the Belmont Race Track in June 1945. Then, in July 1945, he made an appointment, by telephone, to speak with the Pinkerton man at the Aqueduct track and, upon inquiry, was told by the Pinkerton man that he would not be admitted there. He alleges that on June 30, 1945 (apparently prior to said appointment) he lodged a complaint with the New York State Racing Commission which was denied on July 20, 1945 (R. 9-10; 24-5). He then started this action.

His complaint has been dismissed unanimously, by the two highest appellate courts of New York on the ground that under the common and statutory law of that state respondent racing association has a right to choose its patrons and to exclude persons from its grounds except for race, color, creed or national origin and that petitioner does not have a legal right to enter its grounds to attend its races or to bet thereon.

The pith of petitioner's complaint and petition is that he, as a member of the general public, has an unqualified

legal right or privilege, under New York statutes, to enter upon and to attend horse races on respondent's property in order to engage in pari-mutuel betting thereat and that such right or privilege is guaranteed to him by the "equal protection" clause of the Fourteenth Amendment of the Federal Constitution.

He seeks review by this Court to present this claimed federal constitutional right to bet on horse races on respondent's property.

POINT I

No reasons exist here for granting writ of certiorari.

Since review on writ of certiorari is purely discretionary, special and important reasons must be shown to justify its grant (U. S. Sup. Ct. Rule 38(5)). No such reasons are shown by petitioner or exist here.

The case does not, actually, involve any federal question of substance. The decision of the state court sought to be reviewed was grounded on applicable principles of state law and not on any federal question. Moreover the state court's decision does not conflict with any applicable decision of this Court (*Cf.*, *Marrone* v. *Washington Jockey Club*, 227 U. S. 633, where this Court held that even a ticket of admission to a race track was merely a license which properly could be revoked either by refusing admittance to the purchaser or by ejecting him. Also, *Cf.*, *Western Turf Association* v. *Greenberg*, 204 U. S. 359, where this Court held that the Fourteenth Amendment could not be invoked by a racing association to strike down a state statute regulating the terms of admission to places of amusement and entertainment since that was a proper exercise of police power).

New York has specific and detailed statutes governing such admissions, as well as racing and pari-mutuel betting, which have been construed by its highest court.

The question of petitioner's right or privilege, if any, to enter upon respondent's race track in order to make pari-mutuel bets on horse races being run there, seems clearly to be a matter of local state law and private rights and not a matter of general, public or federal significance or importance—calling for the intervention of this Court. Petitioner's various contentions have received extended, careful consideration by the two highest state appellate courts.

POINT II

Questions of New York State law are controlling in this case and the decision of that State's highest court should be regarded as conclusive and not reviewable by this Court.

Where, as here, the local state law, statutory and common, is determinative of the case, the unanimous decision of the Court of Appeals of New York, expressly stating and construing that law, should ordinarily conclude the litigation. Particularly is that so, where, as here, the next highest appellate court of that State also unanimously reached a similar decision.

This court often has pointed out that the state court of last resort should have the final word on the construction and meaning of the statutes of that state and that its decision thereon should be accepted by this Court (*Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32; *Huddleston* v. *Dwyer,* 322 U. S. 232).

The New York courts have written full opinions stating the reasons why petitioner's complaint and contentions lack validity and expounding the statutory and common law of New York controlling the case. Among the determinative questions of law decided herein by said courts are the following:

(1) At common law a race course proprietor like proprietors of other kinds of amusement places, had the right to choose his patrons and to exclude other persons therefrom on his own volition.

(2) In New York the legislature has not changed or limited this common law right, except to the extent of prohibiting exclusion from race courses because of race, creed, color or national origin under the N. Y. Civil Rights Law.

(3) Although the business of conducting horse races and pari-mutuel betting at a private race track may be affected by a public interest to the extent of justifying regulation, licensing and taxation under the police power or for the purpose of revenue, it is in no sense public property or a public function or calling requiring admission of and service to all persons.

(4) A license to conduct horse racing or to conduct betting, under the Racing and Pari-Mutuel Laws of New York, is not a franchise and neither the license nor the exaction of a fee or tax for the license makes the licensee the administrative agent or official of the State.

(5) The enactment of the New York Pari-Mutuel Law did not change the essentially private character of the business and property of a race track proprietor or affect his right to select his patrons.

The opinions below cite the controlling authorities in support of each of these propositions, which need not be repeated here. We will mention but one.

As long ago as 1897 in *Grannan* v. *Westchester Racing Association*, 153 N. Y. 449 a "patron of the races," such as this petitioner claims to be, was refused admission to a New York race track though he had purchased and presented a ticket of admission and agreed to comply with all the rules and regulations. He brought suit against the racing association for an injunction. The Court of Appeals, in unanimously reversing the Appellate Division and affirming a Special Term order denying an injunction, held that "a person who frequented such races had only a *qualified* right to be present" (at p. 460). It specifically overruled and repudiated the theory, advanced by the Appellate Division, "that the racing association was a corporation organized for a public purpose, enjoyed a public franchise, and, therefore, the public had an interest which required the corpora-

tio
admit to its races all persons who applied for
als and paid the entrance fee charged". The Court
luruled plaintiff's contention that he had an "abso-
Ci" to attend the races, and after referring to the
189ts Act of 1895 (Equal Privileges Statute, Laws of
p. 1042) stated (p. 465):

> We think the purpose of the statute now under con-
> eration was to declare that no person should be
> prived of any of the advantages enumerated, upon
> ground of race, creed or color, and that its pro-
> ition was intended to apply to cases of that char-
> er, and to none other. It is plain that the legis-
> ure did not intend to confer upon every person all
> rights, advantages and privileges in places of
> usement or accommodation, which might be en-
> ed by another. Any discrimination not based
> on race, creed or color does not fall within the
> ndemnation of the statute."

Ndecision was approved in *Woollcott* v. *Shubert*, 217
of and other later cases and has represented the law
ork for half a century.
sain this case, petitioner is urging again the very
yory and contention first advanced by Grannan fifty
of which were unanimously repudiated by the Court
stls of that day. The Racing Law of today is sub-
ua re-enactment of the Percy-Gray Law of 1895
Yhich that case was decided. Since then the New
(il Rights Law, in respect of equal accommodations,
ti. 40) has been amended many times, including five
cl ce the adoption of the Pari-Mutuel Law, without
in (except to add "national origin") the rule stated
M *rannan Case*. Since the adoption of the Pari-
L aw, Section 40-b was added to the Civil Rights
n "race courses" purposely and significantly were
ded in it.
c lear enough, under the well settled statutory and
ci law of New York, as stated and construed by de-
c f its highest courts, that petitioner has no valid
cl t. Those decisions should be conclusive now, pre-
eview by this Court.

POINT III

The importance and necessity of the right of racing associations to select their patrons is manifested by the entire statutory plan in New York.

It is apparent from the whole statutory scheme in New York that the Legislature neither desired nor intended the general public to have an unqualified right to attend race courses and to bet.

The Racing Law (McKinney's Unconsolidated Laws, Title 21, Chap. 1, Secs. 7501-20) enacted in 1926 was substantially a re-enactment of the Percy-Gray Law of 1895. It provides for the incorporation of racing associations (Secs. 7501-5); the appointment of a State Racing Commission to supervise generally race meetings (Secs. 7506-7); the licensing annually of racing associations by that Commission (Sec. 7508); the revocation of such licenses for failure to comply with the law and the license terms and if not deemed "conducive to the interests of legitimate racing" (Sec. 7509); the licensing of all participants and employees at race meetings by the Jockey Club, under whose rules meetings are required to be run, in order to maintain "a proper control over race meetings" (Secs. 7508, 7512); the posting of notices upon race courses prohibiting disorderly conduct, post-selling, bookmaking, etc. (Sec. 7513); the appointment of special policemen to preserve order and prevent offenses and wrong conduct within and around the track property (Sec. 7514); the penalizing of racing for any bet or reward except as allowed, which is declared "a public nuisance" (Sec. 7515); and the taxing of admissions (Sec. 7517).

In 1940 the N. Y. State Constitution provision prohibiting laws allowing lotteries, post-selling, bookmaking or other kind of gambling was amended to exempt "parimutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government" (Art. I, Sec. 9).

No right to pari-mutuel betting itself was created by the Constitutional Amendment (*Application of Stewart,* 174 Misc. 902; aff'd 260 App. Div. 979; appeal denied 261 App. Div. 851).

Later in 1940 the Pari-Mutuel Revenue Law (McKinney's Unconsolidated Laws, Title 21, Chap. 2, Secs. 7561-7583) was passed, as *"supplemental"* to the Racing Law (Sec. 7561). It legalized pari-mutuel betting in New York "if conducted in the manner and subject to the conditions and supervision provided by this act", for the purpose of deriving from such betting a reasonable revenue for the support of government, and provided that "Such pari-mutuel betting shall only be conducted within the grounds or enclosure of a race track on races at such track and on such dates when racing at such track shall have been authorized pursuant to this act".

Throughout the statute it is apparent that it is designed for the *patrons* of licensed racing associations, rather than the public generally (*Cf.*, Secs. 7563, 7564, 7565, 7568, 7569).

By Section 7563 an association licensed to conduct a race course may be licensed by the State Racing Commission to conduct pari-mutuel betting "on the races to be run thereat", provided it appears that it "has facilities and equipment sufficient to accommodate *its probable number of patrons*".

By Section 7564 the racing association must post a bond to assure its paying the taxes imposed, distributing to the patrons all sums due on winning tickets and otherwise complying with all provisions of the Racing and Pari-Mutuel Laws.

By Section 7565 the racing association must provide within its grounds a place and all equipment and machines required for the conduct of the pari-mutuel system of betting *by its patrons.* Also, it must reimburse the state for the cost of providing supervisory functions at race meetings and of administering the rules (Sec. 7583).

By Section 7577 the license may be revoked if the racing association does not conduct racing at its tracks, including pari-mutuel betting thereat, according to the Racing and Pari-Mutuel Laws, the license and the rules or if its officers

or directorrs *knowingly permit* on its grounds or tracks bookmakingg or other illegal kinds of gambling.

Other ssections relative here provide for rules by the State Racing Commission regulating the conduct of the betting (Secc. 7566); for the payment by the association to the state off a percentage of the pari-mutuel pool deposits and breaks s "as a reasonable tax," which is thereby levied, for the prrivilege of conducting pari-mutuel betting at its track; and t that no licensee shall knowingly permit any minor to be a patrron of the betting (Sec. 7567).

Prior tto the Pari-Mutuel Law the state had attempted in many wways to prevent bookmaking at race tracks. Bookmaker and d professional gambler were outlawed (*Watts* v. *Malatesta*, 262 N. Y. 80; *Bamman* v. *Erickson*, 288 N. Y. 133; *Hofferman* v. *Simmons*, 290 N. Y. 449). The decisions of the courts recognized the difficulties inherent in detecting and convicting a bookmaker (*Cf.*, *People ex. rel. Lichtenstein* v. *Langan*, 196 N. Y. 260; *People* v. *Carpenito*, 292 N. Y. 498).

The Pari-Mutuel Law has attempted to eliminate the bookmaker and professional gambler. The betting is supervised and open and is mutuel, *i. e.*, between the patrons of the pools who establish the odds. It is conducted by and on the grounds of reputable racing associations who are already licensed to conduct races.

These licensed associations cannot be lax for fear of a revocation of their licenses. They must exercise care in selecting their patrons. For example they must, under the Rules of the State Racing Commission (Rule 30b), exclude or reject reputed bookmakers, vagrants, fugitives from justice and persons whose conduct is or has been improper, obnoxious, unbecoming or detrimental to the best interests of racing. Without the long recognized right to choose and exclude their patrons, they would be in constant jeopardy and fear of violating the law, the rules or its license and of being sued, by persons excluded or ejected, for slander, false arrest, etcetera and of being faced with difficulties of proof in this connection by admissible evidence. Since it is against the financial interest of such associations to exclude persons from the races and the betting, and since exclusions and

ejections produce expensive litigation, it may be assumed that the associations will exercise their rights sparingly.

In view of the great difficulty in many cases of obtaining competent legal proof of actual offences, the only practical solution of the difficulty is the continued recognition of the right to refuse admission without the obligation to state the reason therefor.

The New York Legislature, recognizing the problem and desiring to maintain the necessary controls, has clearly indicated its intention to continue the pre-existing right to exclude and not to give the general public an unqualified right to enter race tracks and bet at pari-mutuels. There is no intention, expressed or implied, in the Pari-Mutuel Law to change the existing law regarding admission of the public to race tracks.

As noted above, Section 40 of the Civil Rights Law has not been changed and still prohibits exclusion only for race, creed, color or national origin; and race tracks have been intentionally omitted from the scope of Section 40-b of that law.

The entire legislative and judicial history in New York in respect of the matter is contrary to the position and arguments urged by this petitioner herein and show a definite, purposeful intention to continue, with even more emphasis, the long recognized rule that a racing association, such as respondent, may select its patrons and exclude others and that a person, such as petitioner, has no legal or constitutional right to be admitted or to bet on its property.

In *Kotch* v. *Board of River Port Pilot Com'rs*, 91 U. S. (Law Ed.) 826, this court pointed out the limitations of the "equal protection" clause, and the necessity of considering the broad objectives and the historical evolution of the state laws and institutions in question in determining the applicability of the clause.

In light of such considerations, the inapplicability of the clause in this situation is perfectly obvious, as is the importance of not upsetting the statutory scheme as planned and construed.

POINT IV

The Equal Protection clause of the Fourteenth Amendment clearly is not applicable for various reasons.

The act of exclusion complained of by petitioner was that of a private corporation, not of the state or its official or agency. It is state action of a particular character that is prohibited. Individual invasion of individual rights, alleged or real, is not the subject matter of the Amendment (*Civil Rights Cases*, 109 U. S. 3, 11; *Snowden* v. *Hughes*, 321 U. S. 1). Racing associations in New York are private corporations (Racing Law, McKinney's Unconsolidated Laws, Sec. 7501 *et seq.*). They have not lost that character simply because the state licenses and supervises generally their activities of horse racing and pari-mutuel betting and taxes admissions and betting receipts, as the state appellate courts have held herein.

There is no claim that petitioner has been affected or interfered with in the exercise or pursuit of his occupation or calling. There is no claim by petitioner that horse racing and betting are anything but amusements so far as he is concerned. Admissions to places of amusement are governed by the New York common law and Civil Rights Law. He does not claim any violation of the Civil Rights Law, which prohibits discrimination at race courses only on account of race, color, creed or national origin (Secs. 40, 40-b).

In so far as petitioner's invocation of the Fourteenth Amendment is based on the assumptions that racing associations, under the New York statutes, are operating under a franchise and are monopolies, and are state agencies, it is enough to say that the highest state court has held, in construing these statutes, that such assumptions are entirely unfounded.

None of the decisions cited in Petitioner's brief, in support of his claim as to the applicability here of the "equal protection" clause, are relevant or analogous. They all involved much different facts and situations. Conscious

of this, he seeks to bend general language extracted from those decisions to meet his needs and to come within what he terms the "broad compass" of equal protection (Pet. Brief, p. 13).

The limitations of the equal protection clause have been pointed out by this court in many decisions, the latest of which is *Kotch* v. *Board of River Port Pilot Com'rs, supra.* We need not dwell on them. We think it is clear enough that its purpose is not to protect or aid a person in forcing his way into private property in order to bet thereat, against the desire of the proprietor and the considered judgment of the New York legislature and highest courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTIN A. SCHENCK,
HAROLD C. MCCOLLOM,
KENNETH W. GREENAWALT,
Attorneys for Amici Curiae,
One Wall Street,
New York City, N. Y.

New York, July 28, 1947.